

BRB No. 01-0707

GEORGE SHIRAH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL	)	DATE ISSUED: <u>May 30, 2002</u>
TERMINALS	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Brian L. Sykes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order of Administrative Law Judge Fletcher E. Campbell, Jr., denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant has been employed by employer since approximately 1990; for the first year to year-and-a-half of this employment, claimant worked as a container repairman and, thereafter, he worked as a container inspector.<sup>1</sup> He testified that he has been exposed to loud

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<sup>1</sup>Virginia International Terminals has terminals at three locations: Norfolk, Newport

noise during the course of his employment duties with employer; those duties require claimant to circle, in a counter-clockwise direction, container bearing trucks which enter and leave the terminal. Claimant sought benefits for noise-induced monaural hearing loss under Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A), based on the results of audiometric testing administered by audiologist Stephanie Howard on October 25, 1999, which revealed a fifteen percent impairment in claimant's left ear. Claimant underwent a subsequent hearing evaluation by audiologist Theoni Graham on February 23, 2000, which revealed a 13 percent monaural hearing loss in claimant's left ear.<sup>2</sup>

In his Decision and Order, the administrative law judge, having found that claimant was entitled to invocation of the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), determined that the opinions of Dr. Blumberg and Ms. Graham, considered independent of one another, are sufficient to rebut the presumption. Thereafter, upon consideration of all of the evidence, the administrative law judge concluded that claimant's hearing loss is not work-related, and he accordingly denied claimant's claim for benefits under the Act.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption. Employer responds, urging affirmance of the

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News, and Portsmouth. Claimant has worked almost exclusively at the Norfolk terminal.

<sup>2</sup>The audiogram conducted by Ms. Howard also revealed a mild hearing loss at 8000 hertz in claimant's right ear equivalent to a zero percent hearing loss for the right ear under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the *AMA Guides*). Because of the significant disparity in the hearing loss in each of claimant's ears, Ms. Howard referred claimant to Dr. Blumberg, a board-certified otolaryngologist, who conducted an examination on November 5, 1999, and ordered an MRI which was performed on December 2, 1999. Ms. Graham's testing also revealed a mild loss in the right ear at 6000 to 8000 hertz.

administrative law judge's Decision and Order.

Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *See, e.g., Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Id.*; *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *Id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

Claimant avers on appeal that the administrative law judge erred in finding that the opinions of Dr. Blumberg and Ms. Graham are sufficient to rebut the Section 20(a) presumption. The administrative law judge first found that Dr. Blumberg's opinion was sufficient to rebut the presumption. In this regard, the administrative law judge credited Dr. Blumberg's deposition testimony that claimant's left ear does "not really" have the pattern for noise-induced loss because the divergence in the hearing loss patterns in each of claimant's ears occurs at a lower frequency than would typically occur in a noise-induced loss,<sup>3</sup> that the divergence between the losses in the two ears was greater than he would expect to be caused by the fact that claimant's position in his work space exposed him to more noise in his left ear than in his right ear,<sup>4</sup> and that it would be "relatively unusual" for asymmetric hearing loss to be caused by long-term noise exposure. *See* Decision and Order at 4-5, 8; CX 9 at 6-9, 11-12, 14. The administrative law judge next found that the presumption also is independently rebutted by the opinion of audiologist Theoni Graham. *See* Decision and

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<sup>3</sup>Dr. Blumberg testified that the mild hearing loss in claimant's right ear is consistent with noise-induced loss. CX 9 at 8, 12. As previously discussed, *infra* at n.2, claimant's noise-induced hearing loss in his right ear is zero percent under the AMA *Guides* and, thus, is non-compensable. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). Dr. Blumberg testified that the pattern of hearing loss in claimant's left ear would be "extremely unusual" at claimant's age even with significant noise exposure. CX 9 at 12.

<sup>4</sup>Dr. Blumberg stated, however, that claimant's position in his work space in which he experienced more noise exposure to the left ear than the right could be a circumstance causing asymmetric noise-induced hearing loss. *See* Decision and Order at 4; CX 9 at 6-7; EX 2; *see also* Hearing Tr. at 17-21, 24-27.

Order at 5-6, 8-9. The administrative law judge credited Ms. Graham's deposition testimony that the difference between the hearing loss in each of claimant's ears is too great to be explained by his asymmetrical workplace noise exposure. *See* Decision and Order at 5-6, 9; EX 6 at 8-14.

We affirm the administrative law judge's determination that Ms. Graham's opinion is sufficient to rebut the Section 20(a) presumption. The administrative law judge specifically addressed claimant's concerns regarding Ms. Graham's knowledge of the actual working conditions experienced by claimant. In addressing claimant's assertion that Ms. Graham's testimony reveals that she was unaware that claimant is constantly exposed to noise from running engines while conducting container inspections, the administrative law judge stated that Ms. Graham, when informed that the container was mounted on a truck, testified that her opinion that claimant's left ear hearing loss was not caused by work-related noise exposure would not change. *See* Decision and Order at 9; EX 6 at 9-10, 13. In this regard, the administrative law judge inferred from Ms. Graham's testimony that the fact that the trucks were running would not alter her opinion because the degree of asymmetric loss suffered by claimant would have been caused by exposure to "implosive" or "impact" noise. The administrative law judge concluded that the evidence of record does not show that the truck engines in claimant's work environment produced this type of impact noise. *See* Decision and Order at 9 n.6; EX 6 at 9-10, 13. The administrative law judge's evaluation of Ms. Graham's testimony and the inferences drawn therefrom are reasonable and supported by the evidence. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4<sup>th</sup> Cir. 2000); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998).<sup>5</sup> As Ms. Graham's

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<sup>5</sup>Claimant cites claimant's hearing testimony, as well as the reports and testimony of industrial noise expert Thomas Bragg, as evidence that claimant was exposed to workplace noise sufficient to cause his asymmetrical hearing loss. We do not agree that the evidence cited by claimant invalidates the inference drawn by the administrative law judge from Ms. Graham's testimony. The administrative law judge reasonably inferred that Ms. Graham held the opinion that only exposure to "implosive" or "impact" noises would cause the degree of asymmetrical hearing loss sustained by claimant. Contrary to claimant's argument, the administrative law judge's finding that the truck engines in claimant's workplace did not produce this type of noise is supported by substantial evidence of record. A review of Mr. Bragg's discussion, in his reports and testimony, of the measurement of impact peak, or impulse noise, in the noise exposure analysis he prepared at the Norfolk terminal indicates that there was no exposure to impact peak noise in the specific area of the terminal where claimant worked. *See* JX 2 at 8-10, 23, 42. *See also* JX 5 at 27-28, 81, 100, 104; JX 6 at 45-46, 93, 97-98.

testimony, considered as a whole, expresses her opinion that the hearing loss in claimant's left ear is not caused by work-related noise exposure, we affirm the administrative law judge's reliance on her opinion to find the presumption rebutted.<sup>6</sup> *See Coffey*, 34 BRBS at 86-87; *see also Universal Maritime*, 126 F.3d at 263, 31 BRBS at 123(CRT).

Having found the Section 20(a) presumption rebutted, the administrative law judge

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<sup>6</sup>In light of our affirmance of the administrative law judge's determination that Ms. Graham's opinion is sufficient to rebut the presumption, we need not reach the issue of whether Dr. Blumberg's opinion, in and of itself, is sufficient to establish rebuttal. The record reflects that while Dr. Blumberg testified that the pattern of hearing loss in claimant's left ear would be "extremely unusual" at claimant's age even with significant noise exposure, CX 9 at 12, his testimony lacks a definitive statement that there is no causal link between claimant's employment and the hearing loss in his left ear. *See* CX 9 at 6-9, 11-12, 14. In fact, he described claimant's loss as being of unknown etiology and could not give an opinion to a reasonable degree of medical certainty. *Id.* Any error committed by the administrative law judge in finding that Dr. Blumberg's opinion establishes rebuttal, however, is harmless as the Section 20(a) presumption is rebutted by the opinion of Ms. Graham.

proceeded to weigh all of the relevant evidence to determine if claimant met his burden of establishing a causal relationship between his employment and his hearing loss. *See Coffey*, 34 BRBS at 86-87. After considering the relevant evidence, consisting of the reports and testimony of Dr. Blumberg, Ms. Graham and Mr. Bragg, the administrative law judge concluded that none of this evidence established that claimant's work-related noise exposure caused or contributed to his hearing loss.<sup>7</sup> *See* Decision and Order 9-10. As claimant has failed to demonstrate any reversible error made by the administrative law judge in his evaluation of the evidence as a whole, we affirm his determination that claimant's left ear hearing loss is unrelated to his employment. *See Coffey*, 34 BRBS at 87; *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

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<sup>7</sup>Although claimant avers that Mr. Bragg's report and testimony constitute substantial evidence that claimant's hearing loss was caused by his employment, the administrative law judge rationally determined that, as Mr. Bragg did not address the asymmetry in claimant's hearing loss, Mr. Bragg's report and testimony could not be considered a reasoned opinion regarding causation. *See* Decision and Order at 9-10. This determination by the administrative law judge is supported by Mr. Bragg's own testimony that while he is competent to testify about noise exposure, he is not competent to testify concerning the cause of hearing loss from a medical standpoint. *See* JX 5 at 10-12.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge